

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 99-69

November 9, 1999

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Best Practices for Expediting the Processing
of Major Unfair Labor Practice Cases

During the past few years the Agency has been involved in several labor disputes that have generated a large number of unfair labor practice charges. In handling these series of cases ("major cases"), we have developed various practices and procedures, although not uniformly applied, to enable us to process them in view of our resources. While major cases can, and do, arise solely in one Region, they usually involve multiple charges filed in several Regions.¹ In such circumstances the procedures for handling these cases, by necessity, have been modified.

There are several basic practices that need to be followed to enable the Agency to process these major cases as effectively and efficiently as possible. Regions must be able to identify such cases as early as possible and notify the Division of Operations-Management. Early identification allows the Agency to utilize its resources fully at the early stage of case processing and, thus, maximizes our effectiveness. It is also very important for the Regional Director to take a direct and active role in the processing of such cases. In addition, in multi-Regional cases, lines of communication between the lead Region and the other Regions must be clearly established during both the investigation and litigation stages. In accordance with these general observations and from our experiences over the years in processing major cases, these best practices are offered below. It is recognized that the nature of particular major cases may warrant or necessitate modifications to these practices.

¹ It is also possible that one charge would constitute a major case so as to warrant implementation of these guidelines.

1. Immediately notify Operations-Management of any situation involving a large number of charges against a charged party or related charges filed in more than one Region. To the extent possible, the AGC or Deputy who initially becomes involved in these cases should continue to be the Operations' representative until these cases are closed.
2. Continuity during the investigation is important. Therefore, these charges should be assigned for investigation to one Board agent or, if necessary, a team of Board agents who work on these cases. The Region and Operations should closely monitor whether the Region needs additional staff, or other resources. This is necessary to ensure that the major case is given appropriate attention and that the remainder of the Region's caseload does not suffer neglect. If it becomes necessary to detail employees to the Region, to ensure continuity of the investigation the detailees should not be given these cases, but rather the remaining cases in the Region.
3. If the charges are assigned to more than one Board agent, one supervisor or manager should be assigned supervision of these cases. In certain situations, it may be appropriate to appoint a case coordinator to keep track of charges on different teams or in different Regions. When there are an unusually large number of charges, a support staff coordinator should be considered.
4. It is essential that the Director become actively involved in the management of a major case. Thus, there should be regular meetings with the Director on the case, and, it should be made clear that the team supervisor/manager has access to the Director as necessary.
5. If assistance is needed from another Region, Operations should secure such assistance as soon as possible. Moreover, either Operations or the lead Director should initially contact the Director of the second Region to advise him/her of the nature of the case(s) and reach an agreeable date for completion of the work.
6. If charges are filed in more than one Region, Operations must identify, as soon as practicable, one Region that will assume overall responsibility for the processing of the cases. In addition, a system must be clearly established for the assisting Region(s) to communicate with the lead Region. The identity of the contact person in the lead Region will depend upon the structure of the team, and lines of authority, established in the lead Region.

7. In multi-Regional cases, copies of the charges should be sent to the lead Region upon filing. The charges are not to be transferred to the lead Region during the investigation. Depending upon the nature of the allegations, the lead Region would advise the other Regions as to specific evidence to obtain during the investigation.
8. Requests to withdraw charges prior to completion of the investigation should not be approved without clearance from the lead Region. Each Region, upon completion of the investigation, should submit to the lead Region copies of the FIR and Agenda Minute, or equivalent documents that set forth the facts, analysis and recommended disposition. The lead Region will make the decision as to whether to dismiss or issue complaint. This procedure would also generally occur in cases involving local issues since the lead Region could ensure that the Charged Party is not presenting inconsistent evidence or defenses in charges filed in other Regions. Also, the lead Region may have knowledge of additional salient facts.
9. Each Region should issue its own complaint. If the complaint involves a national issue, the draft complaint should be reviewed by the lead Region and, upon issuance, the complaint should be consolidated with the cases in the lead Region. It is not necessary, however, to transfer the cases to the lead Region. Similarly, if the complaint involves local issues only, the cases do not have to be transferred, although they might still be consolidated for trial. Settlements or requests to withdraw meritorious charges must be authorized by the lead Region.
10. To ensure continuity of litigation, consideration should be given to having at least one attorney involved in the initial litigation conduct any subsequent litigation.
11. The lead Region should engage in a dialogue with the Division of Judges as soon as possible about the anticipated litigation and the availability of ALJs. The lead Region should formulate the trial schedule in consultation with the other Regions, the other parties and the Division of Judges.
12. Subpoenas for cases involving local issues should be drafted by the individual Region. To the extent necessary, the lead Region should provide to each Region language to include in the local subpoenas along with an explanation as to relevance. In any event, all subpoenas, as well as any Section 102.118 requests, should be coordinated with the lead Region. With respect to national issues, the lead Region should

subpoena potentially relevant documents. Subpoenas should be issued, to the extent possible, several weeks prior to the scheduled hearing so as to direct the parties' attention to the upcoming hearing. In addition, this provides time to possibly resolve subpoena issues and any logistical matters.

13. Although there would need to be coordination of the litigation, its structure would be dependent upon the nature of the issues. Generally, each Region should conduct its own litigation. When the litigation involves a common national issue, absent extraordinary considerations, the attorney from the lead Region should be present at each trial, although the local attorney could be the one to engage in pretrial preparation and be the primary attorney at the trial. This would ensure that all relevant evidence on the national issue is placed in the record and that understandings and agreements between the parties and the ALJ and/or prior ALJ rulings are consistently applied and followed. When the litigated issues involve only conduct confined to each individual site (e.g., 8(a)(3) discharges), each Region should handle its own litigation without direct assistance from the lead Region, absent unusual circumstances. Even in the latter situation, depending upon the issues, there may be a need for the lead Region to coordinate litigation strategy.
14. One of the goals should be to complete the trial as quickly as possible. Requests to postpone the opening or continuation of the trial should be opposed. Sufficient personnel should be assigned to the litigation and to assist in the litigation, as necessary. Thus, if voluminous records have been subpoenaed, additional Board agents should be devoted to examining the documents so as to allow the trial to proceed with little or no interruption. At trial, the attorneys should be provided laptops with litigation software, such as Summation, to enable them to access prior testimony.
15. Briefs should be drafted by each Region, but should be reviewed by the lead Region and, depending upon the nature of the issues, consolidated into one brief.
16. When there is a meeting between the General Counsel and one or more of the parties, the lead Region should be meaningfully involved and, if at all possible, present. In addition, the Region should be involved in discussions held in preparation for the meeting with the parties.

RESOURCES:

The General Counsel recognizes that these major cases can severely tax the resources of a Regional Office. In order to assist the Region in handling such cases as well as its other work, Regions should be aware of various additional resources which may be available to them. After assessing its resource needs to deal with a major case, a Region should consult with Operations-Management to determine whether the following resources can be made available.

Professional Support: In the area of professional resources, an evaluation should be made as to whether a detail should be posted to provide investigative, litigation or supervisory assistance in the case. If it is determined that additional personnel are necessary and budget permitting, details should be posted for assistance in handling the major case or in handling other cases in the office, so that the workload is manageable and professionals assigned to such a case can devote full time to the major case. Consistent with government-wide regulations, management should work with any detailee to facilitate trips home if the detail is for an extended period. An incentive that should be considered for an employee who handles a detail away from their home office is the grant of a significant time-off award. If this incentive could be offered, it can be noted in the posting of the detail. In addition, every effort should be made to ensure that employees on detail receive adequate support staff and technical assistance from the Regional staff they are assisting. The interregional assistance program should be used to provide assistance to the Regions handling major cases when the staffing is such that other cases will suffer. In this regard if a neighboring Region is in a position to help, it could be asked to handle cases in a specific geographic area on a temporary basis. Finally, Regional Directors are encouraged to use each other as a resource. Where one Regional Director has had experience in major cases, that RD can be an excellent resource to regional management in developing a strategy for handling the case.

Support Staff Resources: In the area of support staff resources, Regions should be given authority to hire temporary assistants when the needs of the case require it. In addition, or alternatively outside contractors could be used to assist with copying and scanning duties. To the extent support staff work is portable, interregional assistance should be used to assist the Region. Where the demands of the case require it, authority should be given to allow the Regional Director to grant overtime to support staff employees in order to ensure that there is sufficient clerical support for the investigative or litigation team.

Technological Support: The Region should assess whether additional technological support is required to successfully process the major case. For instance, consideration should be given to providing laptop computers to all Agency attorneys participating in the litigation. The Region should consider whether a scanner would be of significant assistance in the litigation. The Region should consult with ITB and Operations-Management to determine whether a national database could or should be established to track all cases in nationwide litigation involving numerous Regions.

Headquarters Support: Please keep in mind that all major cases are of the utmost importance to the General Counsel. In this regard, as the Division of Advice assists the General Counsel in deciding difficult issues, it may be appropriate for the Region to involve the Division of Advice early in the processing of the case and to seek the Division's guidance as to how to represent the General Counsel's position in the case. The Division of Information can be of assistance in helping to manage the press and dealing with the media. For instance, the Division can assist in reviewing draft press releases or press statements and generally in providing advice on media issues that arise. The Division can have material posted on the Agency web site which can save the Region time and resources.² The determination of what should be released to the media, should, however, be made by the coordinating Region in consultation with Operations-Management. When major cases are investigated and/or litigated away from the Regional Office city, special accommodations may have to be made. For instance, hotel rooms can be rented on a long-term basis; temporary clerical employees can be hired to assist and technological support such as a GSA phone line or a cell phone may be secured if helpful in accomplishing the work in an economical and efficient way. Operations-Management will continue to consider the management of a major case to be an extenuating circumstance that will be taken into consideration in evaluating regional management's performance.

POSSIBLE LEGAL STRATEGIES

1. After investigation, determine the critical aspect(s) of the case, i.e., determine what issue(s) might resolve the case and the remedy being sought. Then focus on these issues in deciding the priorities for litigation and in discussing settlement. Possible options include:
 - a. If possible under Jefferson Chemical, bifurcate the litigation so that the critical issues are litigated first in an attempt to obtain a quicker

² The General Counsel must approve any documents submitted by the Regions to the Division of Information for posting on our site.

resolution. Allegations that would not affect the litigation of the major issues and that would not appear to affect the final remedy (e.g., redundant allegations) could be held in abeyance pending the final Board order.

- b. If bifurcation is not possible, and if the issues permit, consideration should be given to litigating discrete issues ad seriatim to enable the ALJ to issue separate decisions on the various issues during the course of the litigation.
 - c. Discuss with the charging party the possibility of withdrawing the non-critical allegations, especially in situations where there is a Jefferson Chemical problem.
 - d. If Section 10(j) authorization is being sought, insofar as practicable attempt to limit the 10(j) issues to the critical issue(s). Limiting the evidentiary record to this issue enhances the prospect of a speedy decision by the District Court.
 - e. If there is an issue that the parties cannot afford to litigate or that is critical, focus on that issue during settlement discussions.
- 2. Strong consideration should be given to seeking a national remedy when the cases involve more than one facility. Requesting such a remedy would further effectuation of the Act and could assist in furthering settlement discussions between the parties.
- 3.
 - a. In multi-Regional cases, strong consideration should be given, to the extent possible, to the lead Region not becoming involved with the local issues that are not critical to the national issues. The lead Region, however, must be kept up to date on the status of the local issues. Emphasis should be on the lead Region litigating the national issues as soon as possible. Depending upon the extent to which the local issues are separate and discrete, cases with local issues could be tried by each Region concurrently without being consolidated. Although such a strategy would be inappropriate if there were a significant overlap in the issues among the local cases, having each case tried separately without consolidation should be seriously considered even where there is some overlap since having the same judge in all the cases can result in significant delays both in litigating the cases and in issuance of the decisions. If appropriate, a “canned” brief on the requested remedy could be attached to the brief in each case.

- b. In certain circumstances, however, it may be more advantageous to consolidate the cases for trial. This would be a less attractive option the larger the overall case becomes since it could cause undue delay in litigation. It may be advantageous to seek the positions of the parties regarding consolidation by providing notice and an opportunity to be heard on the issue of consolidation.
- 4. When appropriate, consideration should be given to filing a motion with the Division of Judges or the Board seeking expedited litigation of major cases, e.g., a motion seeking a litigation schedule providing for a prompt hearing.

If your Region's experience investigating and litigating major cases suggest other best practices, please forward them to me. If you have any questions about these guidelines, please notify your AGC or Deputy or me.

/s/
R. A. S.

cc: NLRBU

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